No. 2445.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTH ALASKA SALMON COMPANY (a Corporation),
Appellant,

vs.

PEDER LARSEN,
Appellee.

APPELLEE'S BRIEF.

F. R. WALL,
I. F. CHAPMAN,
Proctors for Appellee.

Filed this ..... day of November, 1914.
FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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Supplemental Statement.

All of appellant's testimony was taken in open court. The libelant also testified before the court, but a great part of the testimony in his behalf was taken by depositions.

The record shows that libelant shipped as a seaman on the "Olympic" for a voyage from San Francisco to libelee's salmon cannery at Locanock, Alaska, and

return; that libelant and libelee entered into a written agreement by which libelant agreed to work for libelee in Alaskan waters during the salmon season of 1912 in the capacity of seaman, fisherman, beachman, trapman, and also to work on boats, *lighters* and steamers at and about libelant's cannery during that season (Ap. 6), in other words, there was the usual agreement of a seaman and fisherman going North fishing for the season, paid for the trip up and down, and by the catch or lay while there (See Articles and Ap. 31, 71, 72); that libelant, as one of the crew of the "Olympic," helped work her North; then worked on board of her on her sails until the latter part of June, when he began fishing; that he fished until the 10th of July, when he was taken out of his fishing boat and put to work in one of the libelee's lighters to help discharge the fish that she took from the fishing boats; this lighter and others were used in transporting fish up and down the river, to bring them to the wharf (Ap. 23, 71, 72); in the beginning of the season this lighter, to take on fish, went away down toward Naknek or they towed it up Brown's or Branch River (Ap. 24, 71) to discharge at the fish wharf; the fishing boats would discharge their fish on this barge or lighter, and she would then be towed up to the fish wharf and discharge her fish there (Ap. 24). On July 12th the libelant received his injuries, while at work on board of this lighter, loading fish from the lighter into a bucket to be thence discharged upon the

wharf. At that time, the lighter was lying afloat alongside of the fish wharf (Ap. 24). After the libelant was injured, he was sent to the libelee's bunkhouse, where his knee was painted with iodine by the doctor in libelee's employ; in this doctor's opinion, there was then not much the matter with libelant and libelant would be all right the next day (Ap. 26, 42, 73); this doctor came from Hallerville, three miles away, where the hospital was (Ap. 37); the doctor did not see the libelant again until July 15, when the doctor told the libelant there was nothing the matter with his knee, that the only thing the matter with him was that libelant would better get out and go to work; at this time the doctor told the beach boss in libelant's presence that Larsen was lazy and had better be put to work, at the same time saying he would see the superintendent and tell him to give Larsen lots of work (Ap. 26, 43, 74); after that the entente between the doctor and the libelant was, naturally, not cordial, and although Larsen remained on shore until August 1st, the doctor did not go near him; that on August 1st the beach boss sent Larsen on board the "Olympic," to work at mending sails, and Larsen worked at that on board of the "Olympic" from August 1st to August 23rd, when his leg got so bad he could walk on it with great difficulty, and he came ashore to see this doctor again (Ap. 27, 28); this doctor laughed at him, and again told him there was nothing the matter with his knee; that all that was the matter with him

was that he was lazy (Ap. 28, 43); this was too much for Larsen and, very justifiably, it seems to us, he struck or slapped the doctor in the face (Ap. 36, 43). Certainly from that time on Larsen needed another doctor. On that or the next day Larsen went to the superintendent, stated his case, and asked for another doctor. He got no other doctor, although he might have been sent to one of the many nearby places. He asked to be sent to Nushigak, Koggiung or Naknek or over to Dutch Harbor (Ap. 28). Of this meeting, Hale, the superintendent, testified: "I said (to Lar-" sen), 'Our doctor claims you don't want him to treat " you, and you won't let him treat you.' The doctor " complained *from the first time* he went down there " that this man didn't want him to treat him" (the testimony shows the man was eager to be treated) *"and* "*I had to keep making the doctor go* . . . He " (Larsen) complained of the doctor. The doctor " told me *from the very first* that Larsen didn't want " him to treat him" (Ap. 56, 57). There was no conversation in the libelant's presence between Hale and the bookkeeper about a launch, nor did the libelant tell the bookkeeper or any one else that he didn't want to be taken where he could receive attention; on the contrary, he asked for a launch, and was told there was none to spare (Ap. 63, 64). And Hale himself says that he made no inquiries why Larsen wasn't sent; that he didn't ask the bookkeeper if Larsen had gone; that he didn't ask the bookkeeper why Larsen

did not go; that he didn't ask Larsen why he did not go (Ap. 61). And the large fact is also testified to by Hale that the only time he had any conversation with Larsen was about August 24th (Ap. 58), although Hale knew *from the first* that the doctor did not want to treat Larsen and that the doctor had told Hale that Larsen did not want the doctor to treat him. And with full knowledge of the situation, Hale never caused anything to be done for Larsen and never saw him after this conversation.

ARGUMENT.

Before proceeding to take up the points argued in appellant's brief, we will notice briefly the one as to interest, numbered "(5)" in its brief, on page 5. We do this simply out of an abundance of caution, for we are satisfied that, as the point is not argued or otherwise noticed in the brief or raised in the record, this court will not consider it.

If the appellant had considered itself injured in this respect, it could have brought the matter to the attention of the trial court at any time before perfecting its appeal. This was not done, and the record shows that the point was not in any way urged or considered in the court below.

> "The record does not show that any such objections were made in the court below at any time. The court never was called upon to decide this question. . . .

"In the present case it was not presented in any form or manner whatsoever in the court below, and cannot be considered by this court. *Wasatch M. Co.* v. *Crescent M. Co.,* 140 U. S., 293, 298, 13 Sup. Ct., 600, 37 L. Ed., 454." *Paauhau, etc. Co.* v. *Palapala,* 127 Fed., 922. To the same effect *Lloyd* v. *Preston,* 146 U. S., 630.

Besides, it is usual, for breach of contract, to allow interest in admiralty from the date of the breach or from the filing of the libel. There is a similar rule in equity. *Nashua & Lowell Ry.* v. *Boston & Lowell Ry.,* 61 Fed., 238.

"The allowance of interest in admiralty cases is discretionary, and not reviewable in this court except in a very clear case. *The Scotland,* 118 U. S., 507, 518, sub. nom. *Dyer* v. *National Steam. Nav. Co.,* 30 L. ed., 153, 155, 6 Sup. Ct. Rep., 1174." *The Albert Dumois,* 177 U. S., 255, 44 L. ed., 760.

I.

The Cause is Within the Admiralty Jurisdiction.

Appellant's argument upon this point proceeds upon several erroneous assumptions.

It seems to be confused over the jurisdiction of the admiralty in case of torts and its jurisdiction over contracts maritime in their nature. This is apparent by its citation (Br. 6) of the *Thos. Jefferson,* 10 Wheat., 428, which was a libel for tort, and decided nothing whatsoever in regard to contracts for the hire of seamen, which contracts, of course, have from time im-

memorial been within the jurisdiction of the admiralty. The Jefferson case did decide that, *in torts,* the admiralty had no jurisdiction if the tort occurred beyond the ebb and flow of the tide. But even upon that point, the Jefferson *was overruled* in express language by the *Genessee Chief,* 12 How., 459 (see also cases collected in Rose's Notes to 12 How. at p. 115 of Notes), and the rule ever since the Genessee Chief has been that in torts the jurisdiction extends "to all navigable water of the United States, whether landlocked or open, salt or fresh, *tide or no tide.*" *Ins. Co.* v. *Dunham,* 11 Wall., 1.

But the case at bar is not in tort. It is a libel for the breach of the implied contract to furnish a seaman and fisherman with proper treatment after he was injured while at work on board of a lighter lying afloat in the water of Branch or Brown River.

The contract breached being a maritime contract, it does not matter where the breach occurred. In such a case, "the true criterion (as to jurisdiction) is the " nature and subject matter of the contract, as whether " it was a maritime contract, having reference to mari- " time service or maritime transactions." *Ins. Co.* v. *Dunham,* 11 Wall., 1.

The extension of the jurisdiction of the admiralty to its present position, both as to torts and on contract, is well shown in the cases gathered in note 9 to sec. 8, Ben. Ad., 4th Ed. And the whole subject as to con-

tracts is well summed up, in the same work, at the end of sec. 181, thus:

> "The jurisdiction can depend upon nothing, in matter of contract, but the subject matter, the nature and character of the controversy (*The Resolute,* 168 U. S., 437). If that be connected with ships and shipping, commerce and navigation, the admiralty has jurisdiction, otherwise not . . . 'Toutes affaires relatives à la navigation et aux navigateurs appartient au droit maritime' (See 3 *Pardessus Lois Mar.,* 451, *The Steamship Jefferson,* 215 U. S., 130)."

The law and some of the authorities applying particularly to the case at bar upon this point are:

> Sec. 4612, U. S. R. S. "In the construction of this title (53), every person having the command of any vessel belonging to any citizen of the U. S. shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman';"

Reed et al. v. *Canfield,* Fed. Cas. No. 11,641, was a case of injury to a member of a whaling ship while he was voluntarily away from the vessel on boat duty. While in the boat, he received his injuries. Judge Story there said (p. 428):

> "Indeed, the 18th article of the Laws of Wisbuy expressly declares, 'that a mariner, being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and

cured at the charge of the ship.' The commercial law of France furnishes an equally liberal rule, both in its ancient and modern codes. See 1 *Valin, Comm. lib.* 3, p. 72, tit. 4, art. 11; *Code Com. arts.*, 262, 263; 2 *Pet. Adm. Append.*, p. 33, art. 11. *Cleirac, Us et Coutumes de la Mer.*, p. 31; *Jugemens d'Oleron*, p. 18, arts. 6, 7."

Fishermen on mackerel voyages, in licensed and enrolled vessels, come within the general rule relating to hired seamen so as to be entitled to be cured at the ship's expense. *Knight* v. *Parsons*, Fed. Cas. No. 7886.

"They were hired fishermen, whose wages were dependent on the success of the fishing in which they were engaged. Fishermen are seamen, having uses and customs peculiar to their business, but are at the same time, except as modified by their peculiar contracts, express or implied, protected by the law as other seamen are." *The Carrier Dove*, 97 Fed., 112.

Domenico v. *Alaska Packers Assn.* was a case arising under an agreement practically identical with the one at bar. In that case, Judge De Haven said (112 Fed., 556):

"1. It will be noticed that the principal subject of the contract upon the part of the libelants was for the rendition of services as fishermen at Pyramid Harbor, and included work in the cannery on shore, in preserving the fish caught by them, and also the labor of placing the fish on board the 'Two Brothers' for transportation to San Francisco. The contract is, however, maritime in its nature. The fact that, while engaged in fishing at Pyramid Harbor, the libelants slept on shore,

> and mended their nets, and cared for the fish on shore, and that this was contemplated by the contract, does not make it any the less a maritime contract which a court of admiralty has jurisdiction to enforce. *The Minna* (D. C.), 11 Fed., 759."

The case of *Whitney* v. *Olsen,* 108 Fed., 292, decided by this court, was the case of a seaman and fisherman on a codfishing voyage on a lay.

> A barge without sails or rudder, used for transporting brick, on which men are employed in loading, carrying and delivering brick is subject to a maritime lien for services on board of her. *The Walsh Bros.,* 36 F., 607.

> A bath house built on boats and designed for transportation is within the admiralty jurisdiction. *Tebo* v. *City of New York,* 61 F., 692.

> Admiralty jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water. *The Gen'l. Cass.,* Fed. Cas. No. 5,307.

> To the same effect are *The Old Natchez,* 9 Fed., 476; *Endner* v. *Greco,* 3 Fed., 411; *One Covered Scow,* 30 Fed., 269.

In the case at bar the libelant was both in the service of the libelant as a seaman and fisherman, under his agreement, and was injured while performing work of a maritime nature upon a floating lighter, used by libelee for transporting fish from the fishing boats to the wharf. So that he was there in double trust, under the aegis of the admiralty.

II.

The Testimony is Ample to Sustain the Finding that Libelee Did not Furnish Libelant with Proper Care and Attention.

There need only be said under this head that the court heard the libelant and the witnesses for the libelee testify, and chose to believe the libelant. What we have set out in the supplemental statement shows that the court could have done nothing else. But appellant itself says (Br. 3) "there is a conflict in the evidence" on the material point. Under the well-settled rule here, this court, of course, does not consider changing the findings of the trial court, unless the same are clearly unsupported by the evidence.

But here, too, counsel for appellant begs the real question, which is not, Was the company negligent in employing Dr. Hassett for the trip? But is, Did the company at any time during the season and before the end of the voyage fail to furnish libelant with proper care and attention, after his injuries? We submit, the only conclusion that could be reached by the trial court, from the testimony, was that the libelee did not provide or exercise reasonable judgment to provide proper medical treatment and attendance after Larsen was injured. It is an implied part of every contract of a seaman that he shall at all times during his service receive such proper surgical and medical care and attention as the circumstances permit to be given. The

libelee knew, through its superintendent, "that the doctor complained from the first time he went down there that this man did not want him to treat him"; that he (the superintendent) had to keep making the doctor go. Yet with this knowledge and after the man himself had grown steadily worse and had himself complained to the superintendent, the libelee failed to see that he received proper treatment, although the same was easily accessible; that after this the libelant continued to grow worse.

III.

The Award Made Below Was Strictly in Accordance With the Rule Laid Down by This Court in the Case of The Troop, 128 Fed., 858.

There, this court said, after fully considering the case of the Osceola:

> "It has been uniformly held for nearly a quarter of a century that a seaman injured while in the service of his ship is entitled to proper care and medical attention at the expense of the ship, and that, if this be neglected, the ship may be held in consequential damages." *The Troop,* 128 Fed., 858, citing cases.

The amount awarded Larsen was nothing more than the amount deemed by the court the proper measure of his damages. In fact the court below said, what was not absolutely necessary for the decision of the case (Ap. 92):

"If he had received proper treatment at the time of his injury and up to the end of the voyage home, nothing would be allowed him for expenses or losses thereafter."

In the Iroquois the award was $3000 and in the Troop $4000. Each award was sustained by this court. It is, therefore, not necessary to consider the cases cited by appellant under this subdivision. However, it may be said that it is not the law that the obligation of the vessel or her owners does not extend beyond the end of the voyage. In the case of *Barwa* v. *"Svea,"* No. 15,032, Northern District of California, Judge Bean said:

"The later and more humane rule is that the liability of the ship may extend beyond the voyage, that is, for a reasonable time, if necessary to effect the cure, so far as the same can be done with ordinary care and attention. . . . So long as the injured seaman requires medical care and attentions, nursing and the like, on account of his injuries, the expenses thereof are to be borne by the ship."

"In the nature of things the end of the voyage does not end the obligation, if there was not sufficient time and facilities for the vessel to have thus done its duty. Its unfulfilled obligation may continue after the voyage ends." *The Mars,* 149 Fed., 731, C. C. A. 3rd Cir.

"Under the evidence, I think an allowance of $500 and interest should be made. The claimant was in the hospital for three months, where he was maintained and cared for free of charge. But he

could not work for about nine months longer, and he has spent money for medicine, crutches and an artificial foot (once renewed), and still owes for boarding during the time he was under disability. A decree may therefore be entered for $500, with interest from November 21, 1911, (this seems clearly a typographical error for 1910, *the date of the accident*), and costs." *Doughtery* v. *Thompson Lockhart Co.,* 211 Fed., 227.

The case here is this:

For the breach of a maritime contract, the court below, on most convincing testimony, determined that the proper measure of libelant's damages was $506, with interest from the date of the filing of the libel.

We respectfully submit that the decree should be affirmed.

F. R. WALL,
I. F. CHAPMAN,
Proctors for Appellee.